Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

HENRY BLUME LOE,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

HERBERT V. LARSON, JR.*
700 Camp Street
New Orleans, Louisiana 70130
(504) 528-9500

* Counsel of Record

Attorney for Petitioner
Henry Blume Loe

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QUESTION PRESENTED FOR REVIEW [1]

I.

Whether the Government's successful appeal of the dismissal of counts for insufficient evidence, on a motion made pursuant to Fed.R.Crim.Proc. 29(a), and granted pursuant to Fed.R. Crim.Proc. 29(b), violates the double jeopardy clause of the Fifth Amendment.

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[1] The names of all parties to this proceeding appear in the caption. See Rule 14.1(b) of the Supreme Court Rules.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
OPINIONS OF THE COURTS BELOW	1
STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
ARGUMENT AND REASONS FOR GRANTING THE WRIT	8
I. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS DECIDED AN IMPOTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT	8
CONCLUSION	15
APPENDIX	1a

TABLE OF AUTHORITIES

CASES — Page

Fong Foo v. United States, 369 U.S. 141 (1962)... 8
Jackson v. Virginia, 443 U.S. 307 (1979)..... 14
Serfass v. United States, 420 U.S. 377 (1975)..... 8, 10
Smalis v. Pennsylvania, 476 U.S. 140 (1986)..... 10
United States v. DiFrancesco, 449 U.S. 117 (1980)..... 11
United States v. Jenkins, 420 U.S. 358 (1975)..... 8
United States v. Martin Linen Supply Co., 430 U.S. 564 (1977).....10, 12, 13
United States v. Scott, 437 U.S. 82 (1978).....10, 11, 12
United States v. Wilson, 420 U.S. 332 (1975) 8, 9

OTHER

Sauber, Richard, and Waldman, Michael, *Unlimited Power: Rule 29(A) and the Unreviewability of Directed Judgments of Acquittal*, 44 Am.U.L.Rev. 433 (Winter, 1994)..... 5

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Henry Blume Loe respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered in this proceeding on August 14, 2001, to decide the important question of federal law presented herein.

OPINIONS DELIVERED IN THE COURTS BELOW

The November 5, 1999 "Order" granting Henry Blume Loe's motion for judgment of acquittal as to counts 1-5 of the superseding indictment is not reported. It is attached to this petition as Appendix "C". The opinion of the United States Court of Appeals for the Fifth Circuit which gives rise to this petition is reported as *United States v. Loe*, 262 F.3d 427 (5th Cir.2001). The opinion is attached to this petition as

Appendix "B". By order entered on September 26, 2001, the Fifth Circuit denied Loe's petition for rehearing. This order is attached to this petition as Appendix "A".

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

In July and August, 1999, Henry Blume Loe was tried by a jury on a ten-count indictment in the United States District Court for the Eastern District of Texas. At the conclusion of the Government's evidence, Loe moved for a judgment of acquittal pursuant to Fed.R.Crim.Proc. 29(a), both orally, and in writing. The motion was taken under advisement by the district court. Thereafter, Loe was convicted on all 10 counts of the indictment. The district court then granted the motion for judgment of acquital as to counts 1-5. On December 10, 1999, a judgment and conviction order on the remaining five (5) counts was entered against Loe, sentencing him to twenty-four (24) months imprisonment, and imposing a fine of $50,000. Loe timely filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit, as did the United States.

On August 15, 2001, the Court of Appeals issued an opinion affirming Loe's conviction and sentence on the five counts he had appealed (counts 12-16). In addition, the Court of Appeals reversed the district court's judgment of acquittal on counts 1-5, and remanded the case for resentencing. Loe timely filed a petition for rehearing. On September 26, 2001 the Court of Appeals denied the petition for rehearing. In accordance with Supreme Court Rule 13.3, this petition has been filed within ninety (90) days of the date of the order denying the petition for rehearing.

Accordingly, this Court has jurisdiction over this matter pursuant to Title 28, United States Code, Section 1254(1). *See* Supreme Court Rule 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . .

Title 18, United States Code, Section 3731 provides, in pertinent part, as follows:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

Federal Rule of Criminal Procedure 29 provides as follows:

> **Rule 29. Motion for Judgment of Acquittal**
>
> **(a) Motion Before Submission to Jury.** Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.
>
> **(b) Reservation of Decision on Motion.** The court may reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged

without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) Motion After Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

(d) Same: Conditional Ruling on Grand of Motion. If a motion for judgment of acquittal after verdict of guilty under this Rule is granted, the court shall also determine whether any motion for a new trial should be granted if the judgment of acquittal is thereafter vacated or reversed, specifying the grounds for such determination. If the motion for a new trial is granted conditionally, the order thereon does not affect the finality of the judgment. If the motion for a new trial has been granted conditionally, the appellee on appeal may assert error in that denial, and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

STATEMENT OF THE CASE

INTRODUCTION

"Confused" is the word most often used in the last twenty years to describe the present state of the law regarding the interaction between the Government's statutory right to appeal and the double jeopardy clause of the Fifth Amendment. *See, e.g., Unlimited Power: Rule 29(A) and the Unreviewability of*

Directed Judgments of Acquittal.[1] Indeed, several justices on the Court have themselves used the term: "It is regrettable that the Court should introduce such *confusion* in an area of the law that, until today, had been crystal clear." *United States v. Scott*, 437 U.S. 82, 115 (1978) (Justice Brennan, joined by Justices White, Marshall, and Stevens, dissenting)(emphasis added).

In 1994, Rule 29 of the Federal Rules of Criminal Procedure was amended, presumably to bring some order to the confusion. This was done by adding an amendment that permitted "the reservation of a motion for a judgment of acquittal made at the close of the government's case in the in the same manner as the rule now permits for motions made at the close of all the evidence." *Notes of the Advisory Committee on Rules, 1994 Amendment.*

In the view of the Advisory Committee, this Amendment not only permitted "the trial court to balance the defendant's interest in an immediate resolution of the of the motion against the interest of the government in proceeding to a verdict . . .," it also preserved the Government's statutory right to appeal: ". . . . thereby preserving [the government's] right to appeal in the event a verdict of guilty is returned but is then set aside by the granting of a judgment of acquittal. * * * Thus, the government's right to appeal a Rule 29 motion is only preserved whether the ruling is reserved until after the verdict." *Id.*

This view of Rule 29(b) has been embraced by the Department of Justice, as is evidenced by this case. Such a view, however, only adds to the confusion, as it ignores the plain language of Rule 29, and is contrary to the rulings of this Court. In short, petitioner Loe contends that when a judgment of acquittal has been granted under Rule 29(b) of the Federal Rules of Criminal Procedure, the government has no right to appeal.

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[1] Sauber, Richard, and Waldman, Michael, *Unlimited Power: Rule 29(A) and the Unreviewability of Directed Judgments of Acquittal*, 44 Am.U.L.Rev. 433 (Winter, 1994)

THE SPECIFIC FACTS OF THIS PROCEEDING

Henry Blume Loe's trial by jury began July 21, 1999. On August 5, 1999, the Government rested its case-in-chief. Immediately thereafter, on that same day, counsel for Henry Blume Loe orally moved for a judgment of acquittal, pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure. This oral motion was reduced to writing, and a formal, written, motion for judgment of acquittal was filed the next morning, August 6, 1999, at 8:17 a.m.—before trial resumed. After hearing argument on the Rule 29(a) motion, the district court took it under advisement, in accordance with Rule 29(b) of the Federal Rules of Criminal Procedure.

After the motion was taken under advisement, Henry Blume Loe offered evidence in his defense. At the close of all the evidence, but *before* the case was submitted to the jury, Henry Blume Loe's motion for judgment of acquittal pursuant to Rule 29(a) was renewed by defense counsel. Again, the motion was taken under advisement by the district court, in accordance with Rule 29(b) of the Federal Rules of Criminal Procedure.

Thereafter, the case was submitted to the jury, which on August 9, 1999, found Henry Blume Loe guilty on all counts. Following the jury's verdict, Henry Blume Loe did *not* move for a post-verdict judgment of acquittal, pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure, but instead filed a *supplement* to the Rule 29 motions that had been made on his behalf prior to the submission of the case to the jury; *i.e.*, the two motions for judgment of acquittal that the district court had taken under advisement. This is clear from the face of the pleading filed on behalf of Henry Blume Loe, which is entitled "Supplemental Brief to Motion for Judgment of Acquittal," and which plainly references the motions that had been taken under advisement by the district court.

On November 3, 1999, the district court entered an "Order" in which it dismissed Counts 1-5 of the superseding indictment

because "**[t]he Court finds [the] evidence to be insufficient to support the jury's verdict on Counts 1 through 5.**" See Appendix C, p. 22a. In this "Order," the district court explicitly stated that it was ruling on the *pre-verdict* motions that it had taken under advisement:

> The court has had under advisement the motion of the Defendant, Henry Blume Loe, for a judgment of acquittal, made both orally and in writing at the time the Government rested its case on August 5, 1999. The Court reserved ruling on the motion. The Defendant renewed his motion after all of the evidence was closed, and the Court again reserved ruling on the motion. The Court has now carefully considered the Defendant's motion, his supplemental brief to motion of judgment of acquittal [*sic*], and is of the opinion that the motion should be granted in part and denied in part.

Appendix C, p.18a.

On November 23, 1999, the Government filed its notice of appeal regarding this "Order." After brief, the Court of Appeals for the Fifth Circuit reversed the district court's judgment of acquittal, finding as follows:

> We recognize that some of the circumstantial evidence in isolation can be read to suggest a possibility other than guilt. But when viewed in the light most favorable to the verdict, neither the total composition of that evidence nor certain items, such as Blume Loe's control over the off-the-books bank account and his statement to Ward after the COE meeting, seem to suggest an equally viable theory of innocence. So long as a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt, the evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilty. (citation omitted) that is the case here, and the jury was free to choose among the reasonable constructions of the evidence; one of which was consisted with Blume Loe's guilt. * * *

> Therefore, we reverse the district court's grant of a judgment of acquittal; we direct that the district court reinstate the jury's guilty verdict on Counts 1-5; and we remand for sentencing proceedings consistent with these determinations.

Appendix B, p.10a.

In response, Loe filed a petition for panel rehearing, contending that the opinion of the Court of Appeals violated the double jeopardy clause. This petition was denied. Hence, this petition for a writ of *certiorari*.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

In 1962, in *Fong Foo v. United States*, 369 U.S. 141 (1962), this Court held that the entry of a judgment of acquital during the middle of the government's evidence, even though entered for reasons unrelated to the insufficiency of the evidence, barred a retrial of the defendants. In the eyes of the Court, "[the double jeopardy clause] is at the very root of the present case, and we cannot but concude that the guaranty was violated when the Court of Appeals set aside the judgment of acquittal and directed that the petitioners be tried again for the same offense." *Fong Foo, supra*, p.143.

Fong Foo was followed fifteen years later by three cases decided within ten days of each other: *United States v. Wilson*, 420 U.S. 332 (1975); *United States v. Jenkins*, 420 U.S. 358 (1975); and *Serfass v. United States*, 420 U.S. 377 (1975). In *Wilson*, the Court held that the double jeopardy clause did not prohibit the government from appealing post-guilty verdict

judgments of acquittal, when the basis for the judgment of acquittal was an error of law. In the words of the Court:

> * * * . . . we continue to be of the view that the policies underlying the Double Jeopardy Clause militate against permitting the Government to appeal after a verdict of acquittal. Granting the Government such broad appeal rights would allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first; it would permit him to re-examine the weaknesses in his first presentation in order to strengthen the second; and it would disserve the defendant's legitimate interest in the finality of a verdict of acquittal. (footnote omitted) These interests, however, do not apply in the case of a postverdict ruling of **law** by a trial judge.

Wilson, supra, p.352.

In *Jenkins*, the Court found that a government appeal from the dismissal of an indictment, without a verdict of guilt or innocence, violated the double jeopardy clause, even though the basis for the dismissal was unclear:

> Here there was a judgment discharging the defendant, although we cannot say with assurance whether it was, or was not, a resolution of the factual issues against the Government. But it is enough for purposes of the Double Jeopardy Clause, and therefore for the determination of appealability under 18 U.S.C. § 3731, that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand. Even if the District Court were to receive no additional evidence, it would still be necessary for it to make supplemental findings. The trial, which could have resulted in a judgment of conviction, has long since terminated in respondent's favor. To subject him to any further such proceedings at this statge would violate the Double Jeopardy Clause: . . .

Jenkins, supra, p.370.

In *Serfass*, the government appealed the pre-trial dismissal of an indictment, a dismissal based on *legal* grounds. Finding that jeopardy had not attached, this Court reinstated the indictment. *Serfass, supra*, p.394.

Just two years later, in *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), the Court again addressed the government's right to appeal, this time in the context of an appeal following a judgment of acquittal entered pursuant to Fed.R.Crim.Proc.29(c). In *Martin Linen Supply,* this Court found that the double jeopardy clause barred an appeal from an acquittal entered under Rule 29(c), when the jury has failed to reach a verdict. *Martin Linen Supply, supra*, p.575. Significantly, Justice Stevens, concurring in the judgment, found that there "is no statutory authority for a Government appeal from a judgment of acquittal in a criminal case"—regardless of when, or by whom, the acquittal is entered.

All the above cases were revisited by the Court only one year later, in *United States v. Scott*, 437 U.S. 82 (1978). In *Scott,* the Court first overruled *Jenkins*. Then, a divided Court found that the dismissal of two counts of an indictment at the close of the govenment's evidence, for reasons other than insufficient evidence, was appealable by the government:

> * * * We now conclude that where the defendant himself seeks to have the trial terminated without any submission to either judge or jury as to his guilt or innocence, an appeal by the Government from his successful effort to do so is not barred by 18 U.S.C. § 3731.

Scott, supra, p.101.

Although the Government's right to an appeal following a judgment of acquittal was addressed again in *Smalis v. Pennsylvania*, 476 U.S. 140 (1986), it is accurate to say that *Smalis* breaks no new ground. Nor did any need be broken, until the 1994 amendment to Rule 29.

If any principle is clear from the above cases, it is that once jeopardy has attached, which in a jury trial is when the jury is sworn, any termination of the trial *on the merits*, in the defendant's favor, normally precludes an appeal by the Government. *See, e.g., United States v. DiFrancesco*, 449 U.S. 117 (1980). As Chief Justice Rehnquist noted in *United States v. Scott*, 437 U.S. at 90-91:

> These, then, at least, are two venerable principles of double jeopardy jurisprudence. The successful appeal of a judgment of conviction, *on any ground other than the insufficiency of the evidence to support the verdict, Burks v. United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1, poses no bar to further prosecution on the same charge. *A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal.* (emphasis added, footnote omitted).

* * *

Later in the opinion, Justice Rehnquist elaborated upon this principle:

> . . . Despite respondent's contentions, an appeal is not barred simply because a ruling in favor of a defendant "is based on facts outside the face of the indictment," [*United States v. Wilson*, 420 U.S. 332, 95 S.Ct. 1013 (1975)] *id.*, at 348, 95 S.Ct., at 1024, or because it "is granted on the ground . . . that the defendant simply cannot be convicted of the offense charged," *Lee* [*v. United States*, 432 U.S. 23, 97 S.Ct. 2141 (1977)], 432 U.S. at 30, 97 S.Ct., at 2146. Rather, a defendant is acquitted on when "the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged." [*United States v. Martin Linen Supply Co.*,430 U.S. 564, 97 S.Ct. 1349 (1977)] *Martin Linen, supra*, 430 U.S., at 571, 97 S.Ct., at 1355. *Where the court, before the jury returns a verdict,*

> *enters a judgment of acquittal pursuant to Fed.Rule Crim. Proc. 29, appeal will be barred only when "it is plain that the District Court . . . evaluated the government's evidence and determined that it was legally insufficient to sustain a conviction."* 430 U.S., at 572, 97 S.Ct., at 1355.

Scott, 98 S.Ct., at 2197. (emphasis added).

In this proceeding, the district court did precisely that: it entered a judgment of acquittal, after it determined that the Government's evidence was legally insufficient to sustain a conviction. Moreover, the manner in which the ruling was made had the legal effect of a *pre-verdict* determination—which is precisely and unquestionably what the district court intended. It is also what is envisioned by the separate sections of Rule 29. Had the district court *not* taken the Rule 29 motion under advisement, but instead, ruled upon it at the time it was made, and dismissed the counts, the Government plainly would have had no right to appeal. *See United States v. Martin Linen Supply Co.*,430 U.S. 564 (1977). By reserving its ruling until after the jury's verdict, the district court simply employed the procedure permitted by Rule 29(b)—which permits such reservation, on the condition that the judge consider "the motion on the basis of the evidence at the time the ruling was reserved." In other words, a Rule 29 motion taken under advisement, pursuant to Rule 29(b), should treated as a *nunc pro tunc* motion.

Thus, the granting of a motion taken under advisement pursuant to Rule 29 (b) means, at least from a constitutional perspective, that the counts that were dismissed should not have gone to the jury at all. And if the counts should not have gone to the jury, then the Government certainly has no right to appeal an acquittal on those counts, and their subsequent dismissal, to seek to reinstate them. Constitutionally, there is not, nor could there be, any difference between a motion for acquittal made at the close of the Government's case, *and granted at that time*, and a motion for acquittal made at the close of the

Government's case, but taken under advisement, and granted at a later time. This was the point made by the Supreme Court in *United States v. Martin Linen Supply Co.*,430 U.S. 564, 97 S.Ct. 1349 (1977). In *Martin Linen Supply*, the district court entered a judgment of acquittal under Rule 29(c), after the jury was unable to reach a verdict. The Supreme Court held that the double jeopardy clause prohibited the Government from appealing this acquittal, even though it came after the jury had been discharged, *i.e.*, at a time when the defendant faced the prospect of a retrial even without the Government's appeal:

> Such a limitation on the role of a trial judge, however, has never inhibited his ruling in favor of a criminal defendant. *Fong Foo v. United States*, 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962), establishing the binding nature of a directed verdict, is dispositive on that point. Since Rule 29 merely replaces the directed-verdict mechanism employed in *Fong Foo*, and accords the federal trial judge greater flexibility in timing his judgment of acquittal, no persuasive basis exists for construing the Rule as weakening the trial court's binding authority for purposes of double jeopardy. (footnote omitted). Rather, the Notes of the Advisory Committee have confirmed that Rule 29 intends no substantive alteration in the role of judge or jury but creates a purely formal modification of the directed-verdict device in order "to make the nomenclature accord with the realities." 18 U.S.C. App., p. 4504. *Accordingly, United States v. Sisson, supra, at 290, 90 S.Ct. at 2129, held that Rule 29 recognizes no "legal distinction" between judge and jury with respect to the invocation of the protections of the double jeopardy clause.*
>
> The Government, however, would read *Fong Foo* and, by implication, Rule 29 differently. It argues that the judge's directed verdict in *Fong Foo* was binding for double jeopardy purposes because the formal verdict of acquittal, though on direction, was rendered not by the judge, but by the jury, which then was discharged. *This in effect turns the constitutional significance of a Rule 29*

> *judgment on a matter of timing*. Thus, if the judge orders entry of judgment of acquittal on his own or on defendant's motion prior to submission of the case to the jury, as he may under Rule 29(a), or after submission but prior to the jury's return of a verdict, as authorized by Rule 29(b)—and the jury thereafter is discharged—the Government's argument necessarily concedes that the Double Jeopardy Clause would preclude both appeal and retrial. If, however, the judge chooses to await the outcome of the jury's deliberations and, upon its failure to reach a verdict, acts on a timely motion for acquittal filed under Rule 29(c) within seven days of its discharge, the Government submits that the Double Jeopardy Clause should not bar an appeal.
>
> *We are not persuaded. Rule 29 contemplated no such artificial distinctions. Rather the differentiations in timing were intentionally incorporated into the Rule to afford a trial judge the maximum opportunity to consider with care a pending acquittal motion.*

Martin Linen Supply, supra, pp. 573 -574 (emphasis added).

Plainly, if the Government has the right to appeal all acquittals under Rule 29, except those heard, *and granted* before the case is submitted to the jury, then Rule 29(b) is superfluous—there is no point in taking a motion under submission to await the verdict of the jury, other than to hope that the jury's verdict renders a decision unnecessary. Rules 29(a) and 29(c) would cover all possibilities. Moreover, a reading of Rule 29(b) that subjects a defendant to the possibility of an appeal by the Government, just because a district judge wants to act prudently, is one that indirectly eviscerates the holding of *Jackson v. Virginia*, 443 U.S. 307 (1979).

To put the matter another way: when the Government appeals a judgment of acquittal granted under Rule 29 (c), *i.e.*, on a motion *made after* the jury is discharged, the Government is attempting to reinstate the jury's verdict. This the Court allows. *See United States v. Scott, supra*. However, when the

Government appeals an acquittal on a Rule 29 motion made *before* the jury's verdict, one which is granted on the state of the evidence as it existed *before* the verdict, then the Government is attempting to instate a verdict that as a matter of law, cannot exist. This the Government cannot do, consistent with the Double Jeopardy Clause of the Fifth Amendment.

This Court should grant *certiorari* to consider this important federal question.

CONCLUSION

Wherefore, for the foregoing reasons, this Court is respectfully urged to grant Henry Blume Loe's petition, and to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in this proceeding.

New Orleans, Louisiana, this 21st day of December, 2001.

Respectfully submitted,

HERBERT V. LARSON, JR.*
700 Camp Street
New Orleans, Louisiana 70130
(504) 528-9500

* Counsel of Record

Attorney for Petitioner
Henry Blume Loe